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No. 80-936
(Consolidated with Nos. 80-757 and 80-895)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners,

v.

NEIL LEIST, PHILIP SMITH AND INCOMCO,
Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.,
Petitioners,

v.

NATIONAL SUPER SPUDS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS HEINOLD COMMODITIES, INC. AND THOMSON & MCKINNON AUCHINCLOSS KOHLMEYER INC.

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QUESTION PRESENTED FOR REVIEW

Did Congress create an implied cause of action for da
ages against commodity brokers under the following p
visions of the Commodity Exchange Act:

(i) Section 4a which authorizes the Commodity I
tures Trading Commission, formerly the Commod
Exchange Commission, to set speculative trading a
position limits for specific commodity futures contra
and which makes it unlawful to exceed those limits;

(ii) Section 4b which makes it unlawful for a mem
of a commodity exchange to "cheat or defraud"
customers; and

(iii) Section 9(b) which makes it a felony for a
person to "manipulate . . . the price of any commod
in interstate commerce, or for future delivery on
subject to the rules of any contract market, or to cor
. . . any such commodity . . ."

despite expressly providing many judicial and administ
tive means of enforcing these provisions including crimi
penalties, civil fines and an administrative remedy for
spondents' claims.

PARTIES BELOW

The parties to the three consolidated appeals below

No. 79-7402

Appellants: Neil Leist, Philip Smith and Incomco,

Appellees: Heinold Commodities, Inc. ("Heinold"), son & McKinnon Auchincloss Kohlmeyer Inc. ("Thon Clayton Brokerage Co. of St. Louis, New York Me Exchange ("Exchange"), Richard B. Levine, Howard and Alfred Pennisi.

No. 79-7464

Appellant: Incomco,
Appellee: Exchange.

No. 79-7482

Appellants: National Super Spuds, Inc., William R. Jr., Willard C. Shiner, Eugene P. Weisman, Richard Raymond Rothberg, Arthur S. Armstrong, Theodore Capgain Holdings, Inc. and Heiz Romminger,

Appellees: Heinold and Thomson.

Heinold and Thomson seek review of the judgment 79-7402 and No. 79-7482. Heinold and Thomson w parties to the appeal in No. 79-7464.

Heinold and Thomson are corporations. A listing parent companies, subsidiaries and affiliates appears Joint Petition for a Writ of Certiorari to the United Court of Appeals for the Second Circuit filed in No. 8

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*The following abbreviations are sometimes used in thi "CEA" for the Commodity Exchange Act, as amended (7 § 1 *et seq.*); "CFTC" for Commodity Futures Trading Com "FCM" for futures commission merchant; "Joint Petiti Heinold and Thomson's Joint Petition for a Writ of Certiora United States Court of Appeals for the Second Circuit; Brief" for Brief of Petitioners Heinold and Thomso decision of the court below, *Leist* v. *Simplot*, 638 F.2d 283 1980), is referred to as *Leist*. The page numbers to the majo dissenting opinions used in this brief are the page numbers a in the Joint Appendix (J.A.). *Rivers* v. *Rosenthal & Co.*, 7 774 (5th Cir. 1980), is referred to as *Rivers*. The page nu the *Rivers* opinion used in this brief are the page numbers a in the Joint Appendix to Supplemental Briefs in Support of for Writs of Certiorari to the United States Court of Appeal Second Circuit filed by all petitioners in these consolidat (J.A.S.).

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CONSTITUT
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The Statement of
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PRELIM

A review of the br
CFTC as *amicus curi*
why implied damage
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majority opinion belo
that opinion have, how

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[1]In footnote 2 of its
have no cause of action

denying implied
shortly before ar
8, 1981: *Middles*
Sea Clammers
Industries, Inc.
(1981); *Rodrigu*
1945 (1981); *Cal*
Northwest Airli
S.Ct. 1571 (1981
Coutu, 101 S.Ct.

I. THE MAJO
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(footnote continue
It correctly notes
petitioners] cannot
circumstances wher
[Citation] In this
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Section 4a does no
further states that
mitting the alleged
party. [Citations]
futures commissio
allegedly defrauded
a violation of Sec
charges under 4a a

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statutory dam
nize such impl
Ross & Co. v.
Mortgage Adv
ger v. *Report*
U.S. 136 (198

Radcliff; Rodriguez; and *Sea Clammers.*[2] While these decisions have not specifically been based on an invocation of the constitutional issue, they repeat over and over again that federal courts today have no general common law quasi-legislative powers, and cannot by their decisions create damage remedies which Congress has not created by affirmative legislative action clearly taken with the intent to create such remedies. "The federal judiciary will not engraft a remedy in a statute, no matter how salutary, that Congress did not intend to provide." *Sierra Club,* 101 S.Ct. at 1781.

A right to a damage remedy is distinct from any other rights granted under a statute. The question whether a federal court has jurisdiction over a controversy is distinct from whether plaintiff has a cause of action, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 249 (1951), and the question whether the statute creates a cause of action is distinct from the question of what relief is authorized: "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis* v. *Passman,* 442 U.S. 228, 239 (1979).

A. Federal Courts Cannot Supply A Damage Remedy As A Complement To a Statutory Right.

The majority opinion mistakenly assumes that cases adopting the common law tort theory enunciated in *Texas*

---

[2]The question whether a damage remedy can be implied when a constitutional right is violated does not depend on statutory interpretation, as does the implication of statutory rights, and involves entirely different considerations: *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1973); *Davis* v. *Passman,* 442 U.S. 228 (1979); *Carlson* v. *Green,* 446 U.S. 14 (1980).

& Pacific Railway Co. v. *Rigsby*, 241 U.S. 33 (1916) are still sound law. Not only is the *Rigsby* case's exposition of the tort theory quoted at length (J.A. 117-18), the majority opinion cites a long line of cases based on it as if they were valid precedents for the implication of damage remedies, (J.A. 116-19). The majority opinion argues throughout as if it were unaware that in *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), the tort theory was specifically repudiated.[3] *Cf., Redington*, 442 U.S. at 568.

As the Court in *Rigsby* recognized, its implication of a damage remedy was "but an application of the maxim, *Ubi jus ibi remedium.*" (241 U.S. at 39-40). But *ubi jus* is a maxim of the common law courts, based on the broad quasi-legislative powers of the original common law courts inherent in the declaratory theory of judgments. The reasoning of *Erie* proves that this maxim, which, in effect, confers lawmaking power on common law courts, can no longer apply to our federal courts except in the narrow field in which a federal common law exists. Hence, this Court has refused to hold that a cause of action can be created by "judicial power to fashion appropriate remedies for unlawful conduct." *Northwest Airlines*, 101 S.Ct. at 1582:

> ". . . it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers. [Citation]
>
> • • •
>
> "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete

[3]Despite its importance in the development of the law of implied remedies, the majority opinion nowhere cites *Wheeldin* except as noting its citation in *Cort* v. *Ash*, 422 U.S. 66 (1975). (J.A. 126 n. 20). The dissent properly chides the majority opinion for "ignoring" this decision. (J.A. 217).

provisions. But the authority to construe a statut fundamentally different from the authority to fash a new rule or to provide a new remedy which Congr has decided not to adopt." *Id.* at 1582-83.

(Language repeated verbatim in *Radcliff*, 101 S.Ct. at 20 Because "we are not in the free wheeling days ante ing *Erie*," *Wheeldin*, 373 U.S. at 651, it is time for end to any confusion concerning what can "imply" a ri of action for damages. No longer may federal courts fol *Rigsby* and imply a damage remedy not intentionally cre by provisions enacted by Congress.[4] If such a right is exist it must be expressed or implied in what Congress ena

B. The Present Case Is Not Within Any Of The ceptions To The Federal Courts' Lack Of Autho To Create Remedies.

There are certain exceptions to the lack of authority federal courts to fashion new remedies. One is the po of federal courts sitting as courts of equity, to use tr tional equitable remedies to carry out clear and unequiv Congressional commands. *Virginian Railway Co.* v. *Sys Federation, No. 40*, 300 U.S. 515, 550 (1937). *Cf., Un States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). *Transamerica*, this Court held that the language of Act before it, which specifically pronounced certain tracts "void," necessarily meant that "the customary l incidents of voidness would follow, including the availabi of a suit for rescission or for an injunction against

[4]The pre-1974 cases under the CEA relied on by the maj and by the respondents were all based ultimately on *Rigsby*. (Joint Petition 20-25; Initial Brief 37-39). Not a single case up a damage remedy under Section 4a; and not a single case uphe damage claim against a broker brought by a non-customer u Section 4b.

tinued operation of the contract, and for restit
Transamerica, 444 U.S. at 19. The limited nature
power to supply an equitable remedy was emphasi
the immediately following caveat: "We view quite
ently, however, the respondent's claims for damag
other monetary relief . . . . If monetary liability to a
plaintiff is to be found, it must be read into the Ac
When a statute contains a specific command or cr
clear right, the legal incidents of that command o
may be enforced in equity. This is not the "implic
of a new remedy. In contrast, a right to receive p
in damages for breach of the command is an addition
remedy which may only be provided by Congress.

This distinction between damages and equitable reli
ignored by the majority opinion.[5] Hence, it relies on ca
volving merely the granting of equitable relief,
States v. *Republic Steel Corp.*, 362 U.S. 482 (1960) (c
J.A. 118); *United Egg Producers* v. *Bauer Int'l. Cor*
F.Supp. 319 (S.D.N.Y. 1970) (cited at J.A. 120, 12
Kelley v. *Carr*, 442 F.Supp. 346 (W.D. Mich. 1977)
at J.A. 165), which are not authority for the judicial c
of *damage* remedies.[6]

---

[5]The majority opinion's misunderstanding of the issue is
in its assertion (J.A. 124 n.17) that "if implied causes o
did not exist under the Act, there would be no cause of ac
an injunction any more than there would be for damages.
Court's decision in *Transamerica* exposes the error of the m
assertion.

[6]Another exception is the statutory grant of general a
jurisdiction to the federal courts which has been held to a
the formation "of judge-made rules of maritime law." *N*
Airlines, 101 S.Ct. at 1583. A third exception is the grant of
ity to issue a declaratory judgment "whether or not further re
could be sought." (28 U.S.C. § 2201). Hence, the majority o

(footnote continued on ne

II. DAMAGE REMEDIES MAY ONLY BE FROM LANGUAGE ACTUALLY ENACT LESS THAT LANGUAGE IS SO AMBIG TO PERMIT RESORT TO LEGISLATIVE I

"Implied damage remedies" must be implici thing. Since only Congress can create a dama and can do so only by enacting a statute, it fo implied rights must be implicit in the language of enactments of Congress which the plaintiffs iden source of their rights.[7] This is why "the quest existence of a statutory cause of action is, of c of statutory construction." *Redington*, 442 U.S. a

In each case dealing with an implied statutory question is the nature of the legislative intent a specific statute. . . ." *Davis* v. *Passman*, 442 U

(footnote continued from previous page)

reliance on *Allen v. State Board of Elections*, 393 U.S. (cited at J.A. 118, 146) is misplaced. Contrary to (J.A. 118), this decision did not "sanction an impli action under § 5 of the Voting Rights Act." It mere "appellants may seek a declaratory judgment that a new ment is governed by § 5." 393 U.S. at 555.

[7]Since "our task is limited solely to determining w gress intended to create the private right of action as when it enacted the Act, *Redington*, 442 U.S. at 568, "a begin with the language of the statute itself." Hence, Court pointed out in *Amtrak*, 414 U.S. 453, 456 (197 for the bringing of [the implied] action must be foun within the four corners of [the] Act." The criteria set f v. *Ash* were to be used "[i]n determining whether a pri is *implicit in a statute* not expressly providing one" (42 emphasis added); that is, implicit in the statutory langu by Congress.

The language of the statute controls, with o
if that language is in itself so ambiguous
resort to extraneous aids to interpretation, su
tive history. But "there is no need to refer
tive history where the statutory language is cl
canon of construction has received consistent
our decisions." *Ex Parte Collett*, 337 U.S.
(footnote omitted). Here the statutory langua
ing of the relevant sections of the CEA and of
whole—is clear. It is totally silent as to any in
action.[8] Not a word in the relevant sections rai
to the intent of Congress not to provide a da
or makes the Act ambiguous. What the ma
has attempted to do by use of the 1974 legis

> "is not a construction of a statute, but,
> enlargement of it by the court, so that wha
> presumably by inadvertence, may be in
> its scope. To supply omissions transcend
> function." *Iselin* v. *United States*, 270
> (1926).

In contrast, the Court in *Cannon* emphasized th
of "right-creating" language which led to the

---

[8]While *Cort* v. *Ash* suggests use of legislative hist
of the three factors which this Court has recognized
relied upon in determining legislative intent." *Redi*
at 576. Hence, *Cort* presumably suggested no
traditional use of legislative history—to clari
Consulting legislative history in the absence of an
statute itself is fraught with particular dangers in tha
encourages single members of Congress, or even con
to "legislate" merely by making a suitable legislative
avoiding the political process of lawmaking envision
stitution. Furthermore, courts are thereby given
to enlarge upon unambiguous enactments by selecti
snippets of often conflicting legislative history.

of the legislative history. In this case, Section 4a, 4b or 9(b) contains any "ri guage.

Moreover, legislative history cannot ir ambiguities which justify resort to such h of legislative history, "[l]ike other extr struction," is " 'to *solve*, but not to *creat* *United States* v. *Shreveport Grain & Ele* 77, 83 (1932) (emphasis in original).

These precedents show that the intentio edy must be found implicit somewhere in t which Congress used in its enactment. clarified in *Coutu:*

> "But the fact that an enactment is a particular class does not end the it must also be asked whether the *statute* indicates that Congress int enforced through private litigation. 444 U.S. at 17-18." *Coutu,* 101 S.Ct. added).

III. THE APPROACHES ADOPTED B ITY OPINION BELOW AND BY ENTS IGNORE THE CONSTI QUIREMENT THAT A DAMAG ENACTED BY CONGRESS.

Neither the majority nor any of the res contend that the 1936 Congress, in ena 4b or 9(b) of the CEA, enacted or intend to sue for damages under those sections. T that Congress took no affirmative action a private cause of action for damages fo tions 4a, 4b or 9(b). Hence, the majorit use several intellectual constructs in an

a source for a damage remedy. None o
fact that such a remedy has never been

**A. The Majority Opinion's Argume
age Remedies Were "Established
Decisions Before 1974, (2) That
Established Were Not Repealed
1974, And (3) Hence "Continue"
False Assumptions And Begs
Whether Congress Ever Created**

The majority opinion asserts that by
1974 amendments "the courts had rea
action into the statute" (J.A. 128) an
thus [is not] whether Congress inten
private right of action in 1974, but r
tended *sub silentio* to alter the signifi
been given these provisions by making
Act." (J.A. 127). This formulation o
tutionally self-defeating since it is based
tion that the pre-1974 lower court dec
the claimed damage remedy. Court de
damage remedies not expressed or imp
acted by Congress.

The CFTC poses the same erroneo
slightly different manner, arguing tha
be found to have repealed a *statutor*
pressly states its intention to do so,
conflict exists between the earlier and
(Br. 14; emphasis added). Since, as t
concedes, a right to damages was not
in 1936, that alleged right to damages
right.

Again, these arguments rest on the f
the federal courts by their decisions

right of action into the statute.'
remains unanswered by respondei
language of the 1936 enactment
Congress to create damage reme

**B. Reliance On The Canon Of
Reenactments Of Statutory**

The majority opinion asserts
the 1974 amendments to the Act h
'the well-recognized canon of co
ment of a statute incorporates pr
tions . . . .' " (J.A. 144). The lo
cases where specific language wi
gloss is repeated in a new ena
language used in the earlier
considered to have adopted also
this Court to such language, a
actment.' " *Shapiro* v. *United S*
(footnote omitted). But the leg
Congress in 1974 does not conta
relevant portions of Sections 4a
single sentence of the substant
visions.[9] Moreover, as discusse
tition at 19-25 and in their Initi
1974 cases did not establish a "

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[9]This point is made clear when
by Congress is examined. Public L
(October 23, 1974). As the maj
106-09) the texts of what are now
enacted in the amendatory legislati
Exchange Act of 1936." The CFTC
the entire CEA as amended was re
Senate Committee reports but ignore
by standing House and Senate Rule
the relevant provisions.

tion that rights of action for
implied in Section 4a, 4b and

The majority opinion asserts
port for the result we have reac
To the contrary, the present
where Title IX, enacted in 197
VI of the Civil Rights Act
stitution of the word 'sex' in
'race, color or national origin'
use identical language to de
Cannon, 441 U.S. 677, at 694-
language had been held to bestc
and "[t]he drafters of Title
would be interpreted and appli
Id. at 696. In 1974, however,
language in the CEA previous
explicit reference in the legisla
tive judicial decisions.[11]

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[10]Furthermore, as pointed out i
been reluctant to assume that lower
adopted by Congress in reenacting
379 U.S. 48 (1964); *United State*
City of New York v. *Saper*, 336 U
Glass Co., 332 U.S. 524 (1947); *W*
315 U.S. 32, 40 (1942).

[11]The 1974 Congress must be
assumptions underlying the pre-
remedy (discussed in detail in our
destroyed in *Wheeldin* and *Amtra*
all based directly or derivatively
decided and would not be followed
1974 amendments, this Court had
414 U.S. 453 (Jan. 9, 1974). The
Poage bill were held on January 23

IV. NEITHER THE M
ENTS HAVE POI
GUAGE FROM V
COULD BE IMPL

A. No Language Ena
Remedy.

Neither the majority
damage remedies may
contained in Sections 4
nor from any language
enactments. The CFTC
ing' language . . . is no
n.26). Similarly the bri
Spuds, Inc. admits, as it
the CEA "do not by the
favor of any special class.

(footnote continued from pre
were held on May 13-22,
October 10, 1974, some
Justice Douglas in a vigoro
the case was "on all fours"
426 (1964), (414 U.S. at
implied remedy was hence
in enacting the 1974 amend
of the fact that the reasonin
which later cases have con
avoid this awkward fact by
decided when the amendme
and that "there is no eviden
ments were aware of it." (J.
the majority opinion's refe
knows the law. (J.A. 127))
this important development
than realistic.

B. No Language E
Remedy.

The majority disav
"the question . . . woul
create a new private rig
it intended *sub silentio*
been given these provi
the 1974 Congress co
damage remedies is t
something affirmatively
did nothing of the kind.
judicial and administr
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> testimony and debates, fails to contain one word approving a private right of action, despite reference by a couple of witnesses and a senator to the subject." (J.A. 174-75).

The diametrically opposed conclusions of the majority and dissent below and the Fifth Circuit in *Rivers* (J.A.S. 21a-23a) drawn from the same legislative history demonstrates that the legislative history of the 1974 amendments, even if relevant, fails to provide *clear* evidence of congressional intent to approve "implied" damage remedies. Pertinent here is what this Court said forty years ago:

> "That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached in itself proves what dubious light they shed." *FCC* v. *Columbia Broadcasting System*, 311 U.S. 132, 136 (1940).[18]

But, as discussed in our Initial Brief at 21, the intent of Congress in 1974 is not relevant and cannot be made so by any play on words.

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[18]The inconclusive nature of the legislative history of the 1974 amendments is illustrated by examination of two of the CFTC's citations. The CFTC relies on the statements of William F. Brooks and Sheldon L. Berens before the House Committee on Agriculture because both statements make passing reference to court actions. Yet these statements are made in the context of bringing attention to the fact that the proposed administrative reparations procedure was inconsistent with such actions. See Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. 52, 321 (1974). While the CFTC would infer approval of damage actions from these snippets, this inference is clearly no more or less compelling than its opposite.

CONCLUSION

For the reasons set forth in petitioners' briefs, the decision of the court below holding that an implied cause of action for damages against futures commission merchants under Sections 4a, 4b and 9(b) of the Commodity Exchange Act is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX

United States Constitution, article I, section 7, clause

"Every Bill which shall have passed the House Representatives and the Senate, shall, before it beco a Law, be presented to the President of the Uni States; If he approve he shall sign it, but if not shall return it, with his Objections to that House which it shall have originated, who shall enter Objections at large on their Journal, and proceed reconsider it. If after such Reconsideration two thi of that House shall agree to pass the Bill, it shall sent, together with the Objections, to the other Hou by which it shall likewise be reconsidered, and approved by two thirds of that House, it shall beco a Law. But in all such Cases the Votes of both Hou shall be determined by yeas and Nays, and the Nam of the Persons voting for and against the Bill sh be entered on the Journal of each House respective If any Bill shall not be returned by the President wit ten Days (Sundays excepted) after it shall have be presented to him, the Same shall be a Law, in li Manner as if he had signed it, unless the Congre by their Adjournment prevent its Return, in whi Case it shall not be a Law."

United States Constitution, article III, section 1:

The judicial Power of the United States, shall vested in one supreme Court, and in such inferi Courts as the Congress may from time to time ord and establish. The Judges, both of the supreme a inferior Courts, shall hold their Offices during go Behaviour, and shall, at stated Times, receive their Services, a Compensation, which shall not diminished during their Continuance in Office.